Denver Law Review

Volume 85 | Issue 2 Article 5

December 2020

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DISQUALIFYING A DISTRICT ATTORNEY WHEN A GOVERNMENT WITNESS WAS ONCE THE DISTRICT ATTORNEY'S CLIENT: THE LAW BETWEEN THE COURTS AND THE STATE

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INTRODUCTION

Should a district attorney be disqualified from a criminal case if a prosecution witness is a former client of the district attorney?[1] Although there has been significant academic, legislative and judicial attention to disqualification of district attorneys in general,[2] and to disqualification of district attorneys who represented the defendant in particular,[3] a prosecu-

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1. Issues of first impression blur the line between positive (what the law is) and normative (what the law should be). *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1231-32 (1987) (summarizing and challenging the positive-normative dichotomy). Because disqualification of district attorneys who represented former-clients-turned-witnesses for the government is an issue of first impression not previously decided, positive law is silent in the sense that it does not clearly allow nor disallow such disqualifications. The question of whether the law should allow for disqualification of district attorneys under such circumstances thus becomes a normative one. *See* Wallace D. Loh, Book Review, *In Quest of Brown's Promise: Social Research and Social Values in School Desegregation*, 58 WASH. L. REV. 129, 165 (1982) (arguing that first impression cases call upon the courts to engage in a jurisprudence of discretion and decide both applicable law and the facts).

2. *See, e.g.*, Abby L. Dennis, Note, *Refining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 Duke L. J. 131 (2007). *See generally* ANGELA J. DAVIS, ARBITRARY JUSTICE – THE POWER OF THE AMERICAN PROSECUTOR 123-161 (2007); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (observing that prosecutors are greatly insulated from judicial control over their conduct); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WISC. L. REV. 399, 425-27; Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000).

3. Allan L. Schwartz & Danny R. Veilleux, Annotation, *Disqualification of Prosecuting Attorney in State Criminal Case on Account of Relationship with Accused*, 42 A.L.R. 5th 581, II.A. (1996); *What Circumstances Justify Disqualification of Prosecutor in Federal Criminal Case*, 110

tor's disqualification when a former client becomes a government witness has received no academic attention, has not been addressed by statutes, and has not been decided by courts.[4] Studying the grounds for disqualification of district attorneys whose former clients become government witnesses sheds light on the complex battle between the judiciary and the state for authority and control over the Office of the District Attorney and the criminal justice system.[5]

In this conflict, the judiciary invokes its inherent powers to disqualify district attorneys and the state responds by asserting executive powers and promulgating disqualification statutes asserting exclusive authority. Recognizing the state's immense power and inherent advantage over defendants, the criminal justice system incorporates safeguards, often by means of broad judicial interpretation, to protect the right of the accused to a fair trial.[6] In the context of disqualification of district attorneys, the judiciary's role in expanding and protecting defendants' rights against the state suggests a sympathetic approach towards motions to disqualify district attorneys.[7] However, to further its interest in effective pursuit of law and order, the state may seek to protect the Office of the District Attorney from undue interference. This motivation may lead to a general approach disfavoring disqualification motions and to displeasure with the exercise of judicial inherent powers to disqualify district attorneys.

The issue of disqualification of district attorneys when a former client becomes a government witness thus involves more than balancing the state's interests in administering law and order via the Office of the District Attorney against the interests of defendants and former-clients-

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A.L.R. FED. 523, I.-II. (1992); 63C AM. JUR. 2d Prosecuting Attorneys §§ 26-28, 48 (2007) [hereinafter *Circumstances*].

4. The question did come up as an issue of first impression before a Colorado trial court in the spring of 2007 in the matter of *People v. Lincoln*, 161 P.3d 1274, 1276 (Colo. 2007). The trial court answered the question in the affirmative. *Id.* The state of the law, however, is unclear because the Colorado Supreme Court reversed and remanded without directly addressing the issue. *Id.* at 1282. For a review of the power struggle between the courts and the state over the regulation of the Office of the District Attorney, see generally BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT vi (2d ed. 2005) (lamenting the passivity of the judiciary in overseeing prosecutorial power).

5. In the battle for control over the District Attorney's Office the "state" is represented by both the executive branch and the legislative branch, working together to curb the power of the judiciary and its exercise of inherent powers. To be sure, I do assert this alliance between the executive and legislative branches generally in the context of the criminal justice system, only that the two branches do cooperate in asserting authority over the Office of the District Attorney vis-à-vis the judiciary.

6. The role of the judiciary in safeguarding the rights of the criminal defendant given the power of the state over the accused has been well documented. *See, e.g.*, Jonathan Simon, Book Review, *Why Do You Think They Call It Capital Punishment? Reading the Killing State*, 36 LAW & SOC'Y REV. 783, 795 (2002) (exploring "examples of the Supreme Court expanding the rights of criminal defendants at the expense of state power"); Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1263 (1998) (examining the role of the defense attorney in limiting "the arbitrary exercise of coercive state power by safeguarding the defendant's entitlement to basic . . . rights").

7. For example, disqualification of a district attorney may be ordered as a remedy for prosecutorial misconduct. *See Circumstances*, *supra* note 2, at § 10[a].

turned-witnesses. It provides an opportunity to explore how law is created in the shadow of, and as the result of, the battle between the courts and the state and to appreciate the consequences for parties caught in the crossfire.

Part I of this article explores the doctrine of inherent powers, its use by the judiciary to disqualify district attorneys in the shadow of its relationship with the executive branch, and legislative attempts to abrogate it by means of promulgating disqualification statutes asserting exclusive authority over the regulation of the District Attorney's Office. It asserts that such exclusive provisions are unconstitutional because they violate the separation of powers doctrine and that courts have the inherent power to disqualify a district attorney beyond the authority granted to them by statute. Finally, Part I examines the circumstances under which courts should exercise their inherent power and disqualify a district attorney whose former client is a government witness.

Part II studies disqualification statutes, argues that such statutes should generally be read to allow for the disqualification of a district attorney who represented former-clients-turned-witnesses for the government, and explores the circumstances under which such disqualification would be appropriate. Part III analyzes a recent Colorado case to illustrate that lack of resolution of the issue of disqualification of district attorneys whose former clients become government witnesses has unfortunate consequences for those witnesses, for defendants and for the integrity of the judicial process.

I. COURTS' INHERENT POWER TO DISQUALIFY DISTRICT ATTORNEYS

A. Courts' Inherent Powers – a Doctrine of "Happy Indeterminacy"?

The inherent powers doctrine is a long-established,[8] cumulative,[9] expansive,[10] judicial assertion of possessing the exclusive authority to regulate the practice of law. Analytically, the doctrine consists of two

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8. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, § 2.2.3, at 27 n.45 (1986) (The first American case commonly cited for asserting the inherent powers doctrine was *In re Mosness*, 39 Wis. 509 (1876)); *see also* Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 Buff. L. Rev. 525, 536 (1983).

9. *See id.* § 2.2.1 at 23.

10. Some of the powers claimed by various jurisdictions include the following:

> [T]he power to promulgate an official lawyer's code; to admit lawyers to practice under specified conditions and to disbar or otherwise discipline admitted lawyers; to define the unauthorized practice of law and to fashion remedies to banish nonlawyers from the defined realms of exclusive lawyer practice, even when the assertedly unauthorized practice has nothing to do with court proceedings; to construct an integrated bar of which all lawyers must be members in good standing in order to continue practicing law; to levy an assessment that every lawyer must pay toward support of the court's activities in regulating the legal profession; and to regulate the conduct of judges and to issue and enforce compliance with the Canons of Judicial Ethics.

Id. § 2.2.2 at 24-5; *see also* Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 Minn. L. Rev. 783, 785 (1976) [hereinafter *Delineation*].

steps. First, courts claim that various "'implied,' 'essential,' 'incidental' or 'inherent'"[11] powers are necessary to maintain the integrity of the judicial process.[12] Second, courts invoke the constitutional law separation of powers doctrine to protect their self-proclaimed inherent powers. The separation of powers doctrine, recognized under federal and state law, generally empowers each governmental branch—legislative, executive, and judicial[13]—to act within its prescribed sphere, and states that "no branch may attempt to exercise a power [bestowed] upon [another] branch."[14] Applying the separation of powers doctrine, courts have asserted that any attempt by either the executive or the legislative branch to encroach upon the courts' inherent power to regulate the practice of law was unconstitutional.[15]

Over time, the regulation of the practice of law pursuant to the courts' inherent powers has been recognized as a traditional judicial function.[16] However, the scope of the doctrine and its application are unclear.[17] Indeed, while courts have clearly established their power to regulate the practice of law, their claim to have this power exclusively and the manner in which courts exercise it in particular instances have been greatly challenged. Interestingly, this state of uncertainty is intentional: courts have generally avoided comprehensively addressing all the competing considerations embedded in inherent powers generally and have instead focused "on the individual inherent power involved in each case."[18]

Specifically, in *Link v. Wabash*[19] the Court established the framework for courts' acquiescence to statutory limitations on their inherent powers, holding that a statute will not abrogate an inherent power of the court absent clear legislative intent.[20] In *Chambers v. NASCO, Inc.*,[21] the

11. Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635, 636 (1935).

12. *See* Comm. on Legal Ethics of W. Va. State Bar v. Ikner, 438 S.E.2d 613, 617 (W. Va. 1993) (quoting *In re Grubb*, 417 S.E.2d 919, 922 (W. Va. 1992) (Generally, courts "have an inherent responsibility under . . . general supervisory powers to preserve the integrity of the judiciary and to maintain the public confidence in our court system.")). Courts possess the power to regulate the practice of law in order to protect the public and to uphold the public confidence in attorney reliability and integrity. *Id.* at 616; *see also Delineation*, *supra* note 10, at 785-86.

13. Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 5 (1989).

14. WOLFRAM, *supra* note 8, § 2.2.3 at 27.

15. *Id.*; *see also* Alpert, *supra* note 8, at 525 ("With but few exceptions, the courts have determined that the doctrine of the separation of powers limits or even precludes legislative regulation of this vital profession."); *Delineation*, *supra* note 10, at 785-86.

16. *Id.*; *see also Delineation*, *supra* note 10, at 784 ("Judicial regulation of the legal profession has predominated for many years.").

17. *See, e.g.*, Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738 (2001) (asserting that the fundamental questions of the source and scope of courts' inherent powers have never been satisfactorily addressed).

18. *Id.* at 739.

19. 370 U.S. 626 (1962).

20. *Id.* at 630-31.

21. 501 U.S. 32 (1991).

Court added that authority granted under a statute only applies to the circumstances specified within it, whereas the inherent powers of the court extend to a full range of circumstances,[22] concluding that even with the grant of statutory power, "inherent power[s] . . . continue to exist to fill in the interstices."[23] Some have celebrated this uncertain state of affairs as one of a "constitutional artistry" and "happy indeterminacy,"[24] arguing that courts have been declining to decide the broader issues embedded in inherent powers, acquiescing to legislation concerning courts' powers and leaving open a zone of undefined judicial discretion in order to avoid direct inter-branch confrontations.[25] Others, however, have critically argued that courts refuse to decide the greater issues because the case-by-case approach allows them to stretch the narrow terms "implied," "essential," "incidental," and "necessary" to rationalize a wide range of actions that are in fact not essential to their exercise of judicial authority.[26]

In any event, and regardless of competing positions regarding the desirability of this state of affairs, the inherent powers doctrine is in disarray with no comprehensive theory regarding its scope and application. On the one hand courts routinely assert the possession of inherent powers and invoke them regularly; and on the other hand courts frequently admonish that such powers must be exercised cautiously,[27] and acquiesce to legislation controlling and restricting their inherent powers.[28] The question becomes, therefore, not whether courts possess inherent powers but whether courts should exercise their inherent powers in a particular instance.[29]

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22. *Id.* at 46.

23. *Id.*

24. Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L. J. 929, 971 (1996).

25. *Id.* at 967-71; *see also* Pushaw, *supra* note 17, at 782-83.

26. Pushaw, *supra* note 17, at 738.

27. *See* Degen v. United States, 517 U.S. 820, 823 (1996) ("Principles of deference counsel restraint in resorting to inherent powers . . . . ").

28. *See, e.g.*, State v. Hoegh, 632 N.W.2d 885, 889 (Iowa 2001) ("We have recognized that some inherent powers may be controlled or restricted by statute. Some inherent powers may even be overridden by statute. Other inherent powers may be so fundamental to the operation of a court that any attempt by the legislature to restrict or divest the court of the power could violate the separation of powers doctrine. (citations omitted)); *see also* Carrington, *supra* note 24, at 967-71.

29. Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?* 92 KY. L.J. 979, 1049 (2004) ("The question, therefore, is not whether court can exercise this [inherent] power, but rather when they should do so." (alteration in original)). Colorado case law illustrates the indeterminacy: on the one hand, the inherent powers doctrine has been recognized consistently and repeatedly by the Colorado Supreme Court. *See, e.g.*, Pena v. District Court, 681 P.2d 953, 956 (Colo. 1984) ("[The inherent powers of the judiciary include] '[a]ll powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court is, therefore it has the powers reasonably required to act as an efficient court.'" (quoting Jim Carrigan, *Inherent Powers and Finance*, TRIAL, Nov.-Dec. 1971, at 22) (alteration in original)). On the other hand, the court has admonished the strict and limited use of inherent powers. *See, e.g.*, *In re* Estate of Myers, 130 P.3d 1023, 1025 (Colo. 2006).

B. Inherent Powers and Disqualification of District Attorneys

The expansive inherent powers doctrine generally encompasses the power to disqualify attorneys.[30] Courts have routinely justified this power on the ground that attorneys are officers of the court,[31] and as such, their conduct directly affects the integrity, efficiency, and public perception of the judiciary.[32] For example, the Colorado Supreme Court has held that inherent powers include the power to disqualify attorneys to preserve the court's integrity.[33]

Courts' inherent powers also include, more specifically, the power to disqualify prosecuting attorneys.[34] That said, courts have been quite reluctant to exercise their power to disqualify district attorneys and quick to follow the *Link* and *Chambers* framework acquiescing to statutes limiting their exercise of inherent power. Reasoning that the function of prosecuting criminal cases has historically been within the province of

30. *See* Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005) ("The authority of federal courts to disqualify attorneys derives from their inherent power to "'preserve the integrity of the adversary process'" (quoting Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir.1979)); Talecris Biotherapeutics, Inc. v. Baxter Int'l, Inc., 491 F. Supp. 2d 510, 513 (D. Del. 2007) (the court has the power to govern conduct of any attorney appearing before it—including disqualification); Conley v. Chaffinch, 431 F. Supp. 2d 494, 496 (D. Del. 2006) (the court's inherent power to govern attorneys "appearing before it" includes disqualification as a regulatory measure); Roush v. Seagate Technology, LLC, 58 Cal. Rptr. 3d 275, 280 (Cal. Ct. App. 2007) (courts possess inherent power to disqualify attorneys in order to further justice and control officers of the court); Oaks Management Corp. v. Superior Court, 51 Cal. Rptr. 3d 561, 567 (Cal. Ct. App. 2006) (explaining Judge's authority to disqualify attorneys originates from courts' inherent power to further justice and control over those who appear before it).

31. *See* Theard v. United States, 354 U.S. 278, 281 (1957) (upon acceptance as a member of the bar, "[h]e became an officer of the court" (quoting Justice Cardozo in People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470-71 (N.Y. 1928))); *see also* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989) (examining the dubious meaning of officer of the court with regard to the attorney's roles and responsibilities in contemporary practice realities).

32. *Delineation*, *supra* note 10, at 785; Dowling, *supra* note 11, at 639 ("The court is regularly engaged in administering correct principles of justice and of fair dealing among men . . . ." Consequently, if an attorney disregards the principles of justice, then the court "has the right to discipline the unworthy member, and exclude those who, in contempt of the tribunal, seek to practice law before it without proper admission, or otherwise disparage the court's dignity.").

33. *E.g.*, *Myers*, 130 P.3d at 1025. ("[C]ourts have the inherent power to ensure both the reality and appearance of integrity and fairness in proceedings before them; and to that end, they necessarily retain the discretion to disqualify attorneys from further representation."). Consistent with the "happy indeterminacy" approach, immediately following its affirmation of the inherent power to disqualify attorneys the court admonished its careful use. *Id.*; *see also* People v. Witty, 36 P.3d 69, 73 (Colo. Ct. App. 2000).

34. Rhodes v. Miller, 437 N.E.2d 978, 979-80 (Ind. 1982) ("[A] trial judge does have the authority, and, in fact, the responsibility, to find that a prosecuting attorney, and/or members of his staff, should be disqualified if he finds facts to be true with reference to such disqualification and to then appoint a special prosecuting attorney to try the cause"); Lux v. Commonwealth of Virginia, 484 S.E.2d 145, 149 (Va. Ct. App. 1997) ("In order to protect prosecutorial impartiality, a trial court has the power to disqualify a Commonwealth's attorney from proceeding with a particular criminal prosecution if the trial court determines that the Commonwealth's attorney has an interest pertinent to a defendant's case that may conflict with the Commonwealth's attorney's official duties"); *see also* State v. Culbreath, 30 S.W.3d 309, 313 (Tenn. 2000); Cole v. State, 2 S.W.3d 833, 835 (Mo. Ct. App. 1999); Brown v. Commonwealth of Virginia, 504 S.E.2d 399, 402 (Va. Ct. App. 1998); State v. Copeland, 928 S.W.2d 828, 840 (Mo, 1996).

the executive branch,[35] and that the legislative and executive branches maintain a strong interest in the appointment of and the exercise of authority over district attorneys, courts have concluded that the interest in the appointment and disqualification of district attorneys is and should be shared by all branches of government.[36]

Recent amendments to disqualification statutes, however, seem to have pushed the envelope and crossed the line from sharing authority over the regulation of district attorneys to usurping it. For example, it seems that the Colorado legislature has attempted to abrogate the courts' inherent power to disqualify a district attorney. Colorado Revised Statute section 20-1-107 purports to specify the "only" grounds for which a district attorney may be disqualified.[37]

The statute itself gives ample support for the preemption intent of the Colorado legislature. First, subsection 20-1-107(2) states: "A district attorney may *only* be disqualified in a particular case . . ." and goes on to specify three grounds for disqualification. "Only" is explicitly exclusive and renders *Chambers* meaningless: the authority granted by the Colorado statute does not apply to certain circumstances, rather it purports to exhaustively define all the circumstances permitting disqualification of district attorneys. Further, the exclusive language of the statute makes it clear that the legislature envisions no "interstices" for the courts to fill in. Second, subsection 20-1-107(1) states in relevant part: "The general assembly finds that . . . [it has] the exclusive authority to prescribe the duties of the office of the district attorney . . . ." The exclusivity language suggests that courts do not have authority over the duties of the district attorney and arguably no authority to disqualify a district attorney. Third, subsection 20-1-107(2) states that a disqualification motion shall not be granted unless a court finds one of the three grounds specified in the subsection, once again lending support for the proposition that a court cannot grant a motion and disqualify a district attorney for reasons other than the ones enumerated in the statute. It further restricts the ability of the courts to disqualify a district attorney by mandating an automatic stay of a disqualification order pending a mandatory interlocutory appeal before the Colorado Supreme Court.[38]

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35. *See* United States v. Jacobo-Zavala, 241 F.3d 1009, 1012 (8th Cir. 2001). State v. Hoegh, 632 N.W.2d 885, 889-90 (Iowa 2001) (finding that a statute granting the power of appointment of a special prosecutor to the county board of supervisors, while removing a power from the courts and vesting it in the legislature, did not violate the separation of powers doctrine because the legislature legitimately shared an interest in and responsibility for the regulation of special prosecutors).

36. *Hoegh*, 632 N.W.2d at 889-90 (finding that a statute granting the power of appointment of a special prosecutor to the county board of supervisors, while removing a power from the courts and vesting it in the legislature, did not violate the separation of powers doctrine because the legislature legitimately shared an interest in and responsibility for the regulation of special prosecutors).

37. COLO. REV. STAT. ANN. § 20-1-107 (West 2007).

38. Arguably, by promulgating an open-ended standard of disqualification which calls for judicial interpretation, *see infra* Part II, the legislature left courts ample room in which to exercise

Furthermore, the legislative history suggests that the Colorado legislature amended the statute in 2002 in response to two 2001 decisions. In *City and County of Denver v. County Court*,[39] the Colorado Court of Appeals held that appearance of impropriety alone justifies disqualification of city attorney's office, despite the fact that the term "appearance of impropriety" no longer appeared in a relevant authorizing statute; and in *People v. Palomo*,[40] the Colorado Supreme Court held that appearance of impropriety can be the basis for disqualification of the District Attorney's Office.[41] Both cases found support for the appearance of impropriety as a ground for disqualification in the courts' inherent powers.[42] It seems clear that the Colorado legislature intended to override these decisions.[43] Indeed, the Colorado Supreme Court has found explicitly that the revised statute "eliminates 'appearance of impropriety' as a basis for disqualification of district attorneys."[44]

A narrow interpretation of the statute, according to which it did not intend to abrogate inherent powers but only meant to disallow the appearance of impropriety as an independent ground disqualification is implausible. First, the legislature could have explicitly disallowed the appearance of impropriety as a ground for disqualification rather than specify the "only" grounds, omitting the appearance of impropriety. Second, the "appearance of impropriety" *is*, and means, the courts' invocation of inherent powers.[45] That is, disallowing the appearance of impropriety is tantamount to challenging the courts' inherent power to disqualify a district attorney.

The Colorado legislature is not alone in trying to restrict the courts' inherent power to disqualify district attorneys. Following the California

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power and discretion. The straightforward language of the statute and the legislative history, however, contradict this construction and clarify that the legislature intended to exercise exclusive authority over disqualification of district attorneys.

39. 37 P.3d 453 (Colo. Ct. App. 2001).

40. 31 P.3d 879 (Colo. 2001).

41. *Id.* at 882; *see also* People v. County Court, 854 P.2d 1341 (Colo. Ct. App. 1992) (holding that appearance of impropriety is not only a proper ground for disqualification of a district attorney, it is also a compelling basis for such action).

42. *Palomo*, 31 P.3d 879; People v. County Court, 37 P.3d at 456 ("Whether an attorney should be disqualified is a matter within the discretion of the court").

43. COLO. REV. STAT. ANN. § 20-1-107 (West 2007).

44. People v. Chavez, 139 P.3d 649, 653 (Colo. 2006); People *ex rel.* N.R., 139 P.3d 671, 675 (Colo. 2006) ("We conclude that, in using the word 'only' and defining with specificity the circumstances under which disqualification is proper, the amended version of section 20-1-107 eliminates 'appearance of impropriety' as a basis for disqualification."); People v. Manzanares, 139 P.3d 655, 658 (Colo. 2006); *In re* E.L.T., 139 P.3d 685, 687 (Colo. 2006). It is possible to assert that while the legislature eliminated the appearance of impropriety as an independent ground for disqualification, the appearance of impropriety nevertheless makes a backdoor reentry into the statute because it can be considered as part of "special circumstances" under the statute. Justice Bender explicitly rejects this approach, however, because he believes that the appearance of impropriety is tantamount to courts' inherent powers which exist outside of and in spite of a disqualification statute. *N.R.*, 139 P.3d at 682 (Bender, J., dissenting).

45. *N.R.*, 139 P.3d at 682 (Bender, J., dissenting) ("The phrase 'appearance of impropriety' establishes a nebulous standard, that broadly describes the court's inherent power.").

Supreme Court decision in *People v. Superior Court (Greer)*,[46] the legislature promulgated section 1424 of the California Penal Code, which states in relevant part: "The motion *may not be granted unless* the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial (emphasis added)."[47] In other words, the California legislature seems to have stated the only ground for disqualification of a district attorney because pursuant to the statute a court may not grant a motion to disqualify unless it finds that defendant has met the statutory standard for disqualification.[48]

To the extent they purport to usurp the inherent power of the courts to disqualify a district attorney, both the Colorado and California statutes violate the separation of powers doctrine and are unconstitutional. Exploring the interplay between the judiciary's inherent power and the separation of powers doctrine, Wolfram argues that the inherent powers doctrine consists of two separate aspects—the "affirmative aspect" and the "negative aspect."[49] Courts invoke the affirmative aspect when they hold that they have the inherent authority to regulate attorneys when statutes are silent on the issue.[50] The negative aspect, conversely, arises when courts hold legislative or administrative laws unconstitutional because either the legislative or the executive branch violated the separation of powers doctrine by attempting to regulate attorneys and the practice of law.[51] The negative aspect of the inherent powers doctrine asserts that the courts, and *only* the courts, may regulate attorneys (emphasis added).[52] The statutes in Colorado and California clearly violate the negative aspect of the inherent powers doctrine. The statutes do not purport to share authority over the disqualification of district attorneys,

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46. 561 P.2d 1164 (1977).

47. CAL. PENAL CODE §1424(a)(1) (Deering 2007).

48. In *People v. Eubanks*, 927 P.2d 310, 317 (Cal. 1996), the California Supreme Court concluded that the statute precluded the use of the appearance of impropriety standard as an independent ground for recusal, holding that the critical analysis in determining the existence of a conflict instead is that "the likelihood that the defendant will not receive a fair trial-must be real, not merely apparent, and must rise to the level of a likelihood of unfairness." Importantly, because the statute did not purport to exercise exclusive authority over the office of the district attorney, the California Supreme Court did not consider whether the legislature's preclusion of the appearance of impropriety as an independent ground interferes with the court's inherent power to disqualify the office of the district attorney. Instead, it merely interpreted the statute and presumably found it consistent with its inherent power and therefore not in violation of the separation of powers doctrine.

49. Wolfram, *supra* note 13, at 4.

50. *Id.* Support for the affirmative aspect of the inherent powers doctrine is found in state constitutions. The language tends to grant the judiciary general power over judicial functions, *id.* at 5, and often resembles a variation of the following: "The judicial power shall be vested in courts consisting of a supreme court and such other courts of inferior jurisdictions as the legislature may establish." *Id.* Pursuant to the affirmative aspect of the inherent powers doctrine state supreme courts regulate attorneys in all fifty states. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1171 (2003).

51. Wolfram, *supra* note 13, at 7.

52. WOLFRAM, *supra* note 8, § 2.2 at 24.

rather, they vest exclusive authority in the legislature to promulgate the grounds for disqualification.

The Supreme Courts of Colorado and California, however, have ignored the unconstitutionality of the disqualification statutes. The Supreme Court of California, in *People v. Conner*,[53] acknowledged that the legislature promulgated section 1424 in order to change the disqualification standard the Court announced in *Greer*, yet accepted and construed the statute without even commenting on the constitutionality issue. Similarly, the Colorado Supreme Court in *People* ex rel. *N.R.*,[54] quoted the legislative declaration of "exclusive authority," noted that such a declaration contradicted the century long doctrine that courts have the inherent power to disqualify a district attorney beyond the authority granted to them by statute, cited at length numerous cases in support of courts' inherent power but concluded that: "it is unnecessary in this case to decide whether the legislature's claim of exclusive authority 'to prescribe the duties of the office of the district attorney' in the context of disqualification conflicts with the judiciary's inherent authority 'to protect its dignity, independence, and integrity.'"[55] Presumably the court did not need to decide the issue because the trial court did not explicitly invoke its inherent powers to disqualify the district attorney.

In his dissent, Justice Bender strongly disagreed.[56] Finding that the trial court acted within its inherent powers, Justice Bender reasoned that "by its use of the adverb 'only,'" the statute "narrows the traditional and time-honored inherent power of the courts and thus violates the constitutional doctrine of separation of powers."[57] Justice Bender rejected the majority's assertion that addressing the declaration of exclusivity is unnecessary, pointing out that by ignoring it the majority "effectively concludes that the disqualification statute does in fact present an exhaustive list of circumstances under which a trial court may disqualify a district attorney."[58] He concluded that "the statute's claim to set forth such an

53. 666 P.2d 5, 8 (Cal. 1983).

54. 139 P.3d 671 (Colo. 2006).

55. *Id.* at 675 n.3.

56. The dissent generally explored courts' inherent authority to protect the integrity of the judicial process as an embodiment of the separation of powers doctrine, and then specifically established that the doctrine encompasses the trial's court inherent power to disqualify a district attorney even beyond applicable disqualification statutes. *Id.* at 680-83 ("The court *is*, therefore it has the powers reasonably necessary to act as an efficient court . . . . We have defined the inherent powers of the judiciary to be the powers of that logically flow from the existence of the judiciary as a the third co-equal branch of government.") (emphasis in original) (citation omitted). It concluded that "trial courts must remain within their constitutional authority when they disqualify a district attorney for reasons other than those specified in section 20-1-107." *Id.* at 682. Finally, it asserted that the statute's language is narrower than the court's inherent powers and thus unconstitutional. *Id.* at 679.

57. *Id.* at 679 (Bender, J., dissenting).

58. *Id.*

exhaustive list infringes upon the inherent power of the court to protect the integrity of the judicial process . . . ."[59]

The dissent reflects the insight that district attorneys occupy the dual roles of officers of the court and executive officers of the state, and therefore the issue of disqualification entails a power struggle between the state and the courts. It notes that a district attorney:

> has the dual roles of executive officer of the state, and, like every other attorney, officer of the court. Hence, although a district attorney is an elected constitutional officer whose duties are prescribed by the General Assembly, she is also bound by the Rules of Professional Conduct and the rules of the court.[60]

Exactly because the question of disqualification of district attorneys entails an important battle for authority between the state and the courts, it is imperative to explore the attempt by the legislature to abrogate judicial power.[61]

Justice Bender further clarified his position in *People* ex rel. *E.L.T.*[62] He importantly explained that while he agreed with the majority that the trial court's original findings were ambiguous and that E.L.T.'s right to a fair trial was not necessarily jeopardized, disqualification was nonetheless justified because the trial court had the inherent power to disqualify the district attorney for reasons other than the ones enumerated in the statute, and specifically, for reasons beyond "special circumstances that would render it unlikely that the defendant would receive a fair trial,"[63] which were unclear in this case.[64] Irrespective of the issue of "fair trial," Justice Bender found that

> these circumstances support the trial court's decision to disqualify the district attorney's office pursuant to its constitutional authority to protect the integrity and appearance of integrity of the court and the judicial process, and therefore its order to disqualify the district attorney's office does not constitute an abuse of discretion [irrespective of whether the E.L.T.'s right to a fair trial was compromised].[65]

To the extent the California and Colorado statutes purport to curtail the courts' inherent powers to disqualify district attorneys and limit dis-

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59. *Id.* at 680.

60. *Id.* at 683 (citation omitted).

61. *Id.* at 682 ("this case presents exactly the circumstances supporting disqualification pursuant to the court's inherent powers because it presents facts which lie outside the narrow limits to the trial court's authority as defined by the disqualification statute.").

62. People *ex rel.* E.L.T., 139 P.3d 685 (Colo. 2006). Justice Bender reiterated his position that the trial court has the inherent power to disqualify a district attorney outside of the grounds specified in the statute. *Id.* at 688.

63. COLO. REV. STAT. ANN. § 20-1-107(2) (West 2007); *see infra* Part II.

64. *E.L.T.*, 139 P.3d at 688 (Bender, J., dissenting).

65. *Id.*

qualification to statutory grounds, the statutes are unconstitutional.[66] One must wonder therefore why both state supreme courts failed to invalidate the unmistakable exclusive language in the statutes.

C. The Case Against Exercising Inherent Powers to Disqualify District Attorneys

An interplay of constitutional and political considerations explains why the Supreme Courts of California and Colorado have not rushed to invalidate their states' district attorney disqualification statutes. From a constitutional perspective, when courts exercise their inherent power to disqualify district attorneys, they simultaneously assert and assault the separation of powers doctrine. Generally, by invalidating a statute, courts declare that the legislature has exceeded the power granted to it by the constitution. By invalidating a disqualification statute, however, courts declare that the legislature has usurped judicial power found not explicitly in the constitution but rather in courts' interpretation of it and of constitutional law theory.[67] In other words, in order to invalidate a disqualification statute courts must invoke the separation of powers doctrine. And yet, invalidating a disqualification statute is an act of judicial interference with important state interests entrusted in the legislature,[68] which the separation of powers doctrine would discourage.

Courts thus are in a bind: invalidating a disqualification statute requires invoking the separation of powers doctrine, the very doctrine which discourages the judiciary from intervening in legitimate interests vested in the legislative and executive branches such as the regulation of the Office of the District Attorney. The regulation of lawyers, let alone the regulation of district attorneys, "strongly involves the traditional legislative concerns with the peace, safety, and welfare of citizens and can involve matters of constitutionally legitimate concerns to the executive

66. Indeed, in its amicus brief, the Colorado Attorney General appears to concede the point. While paying lip service to the majority opinion, see Brief for Colorado District Attorney's Council as Amicus Curiae Supporting Appellant at 18, 21, People v. Lincoln, 161 P.3d 1274 (Colo. 2007) (Nos. 07SA82 and 07SA83) ("This Court has not defiantly resolved whether courts retain inherent authority to disqualify district attorneys in situations that do not meet the requirements of revised section 20-1-107 . . . . The state believes the majority's position is the wiser one."), the Attorney General characterizes the difference between the majority and the dissent not in terms of whether courts generally retain the inherent power to disqualify district attorneys independent of the disqualification statute, but rather narrowly in terms of "whether courts may disqualify district attorneys in order to preserve the 'appearance of fairness' even where there is no potential for an unfair trial." *Id.* at 20. In other words, the Attorney General implicitly acknowledges that courts *have* the inherent power to disqualify district attorneys. To him, the only difference between the majority and the dissent is whether the courts should exercise their inherent power to disqualify a district attorney in order to preserve the "appearance of fairness," not, importantly, whether they have the power to do so generally.

67. More specifically, a disqualification statute violates courts' inherent powers, which is justified in terms of the separation of powers doctrine.

68. "In American democratic theory, popularly elected legislatures are the primary source of lawmaking." WOLFRAM, *supra* note 8, § 2.2.3 at 31; *see also* Brief for Colorado District Attorney's Office Council, *supra* note 66, at 8-10.

branch as well."[69] Thus, invalidating a disqualification statute on the ground that it interferes with the ability of the judiciary to regulate district attorneys is somewhat compromised because the act of declaring the statute unconstitutional interferes with the ability of the state to regulate district attorneys.

From a political perspective, consistent with the "happy indeterminacy" approach I speculate that the California and Colorado Supreme Courts took the encroachment of their powers to be only of academic and theoretical nature and therefore not worthy of a fight. The courts seemed to have determined that the actual injury to their authority, as well as the injury to the defendants was so minimal as to not justify an explicit confrontation with the legislative branch. As we shall see, however, such a conclusion underestimates the impact of disqualification statutes on defendants, fails to appreciate the consequences for witnesses who were once a prosecutor's clients, and consequently their impact on the integrity of the judicial process.

D. The Case for Exercising Inherent Power to Disqualify a District Attorney Who Formerly Represented a Government Witness

If courts have declined to invalidate the unconstitutional component of disqualification statutes because of a political motivation, the logic would be disturbingly faulty. The stakes are much higher than an academic dispute over the separation of powers. Both the California and Colorado statutes ground disqualification in unfairness to the defendant.[70] Importantly, because the statutes do not consider the interests of other parties as relevant in assessing the fairness of the trial,[71] disqualification based on the inherent power of the courts becomes the only viable means of protecting the interests of third parties implicated in the trial, such as witnesses.

In particular, the interests of former clients who become witnesses for the government do not even enter the balance of considerations a court could consider under the disqualification statutes. Consequently, a district attorney may subpoena a former client to testify, compel him to testify by offering immunity and then pursuant to a court order disclose the former client's confidential information to the defendant if it constitutes exculpatory evidence without the former client's consent.[72] Because the former-client-turned-witness is not the defendant, he will not

69. WOLFRAM, *supra* note 8, at 30. The doctrine helps to demonstrate the unique and pervasive power of lawyers, and *only lawyers* (emphasis added), to regulate themselves. *Id.* at 29-31; Wolfram, *supra* note 13, at 16-19.

70. *See infra* Part II.

71. *Infra.*

72. *See, e.g.*, People v. Lincoln, 161 P.3d 1274 (Colo. 2007); *Infra* Part III; notes 190-193 and accompanying text.

be able to protect his confidentiality interest by moving to disqualify the district attorney, his former lawyer.

The harm suffered by a former-client-turned-witness from disclosure of his confidential information may be significant. In addition, compromising the confidentiality interests of witnesses harms an important public interest: confidentiality is the cornerstone of the attorney-client relationship.[73] It establishes trust, enables an open and complete exchange between attorney and client essential to effective representation,[74] and generally fosters public confidence in the legal profession.[75] Statutes that do not even allow courts the discretion to assess the harm to the confidentiality interests of third parties as grounds for disqualification are thus ill-advised.

Confidentiality, to be sure, is not an absolute doctrine. The state's interest in prosecuting a criminal defendant in a particular instance may require the disclosure of confidential information of a district attorney's former-client-turned-witness.[76] For example, in a case in which a former-client of the district attorney is a key witness for the government, confidential information shared by the former-client with the district attorney constitutes exculpatory evidence, a special prosecutor cannot be appointed and the harm suffered by the former-client-turned-witness from the disclosure of his confidential information to the defendant is negligible, the court may order the district attorney to reveal the confidential information to the defendant.

Such a decision to compel disclosure of confidential information, however—especially when the confidentiality interests at stake are those of a third party witness whose only connection to the prosecution is the fact that he happens to be a former client of the prosecuting district attorney—cannot be a foregone conclusion. To the contrary, because of confidentiality's fundamental importance to the client-lawyer relationship, the Rules of Professional Conduct presume to protect confidential information, not disclose it.[77] Consequently, while in some circumstances a district attorney may be ordered by a court, as an exception, to reveal confidential information of a former-client-turned-witness, given the

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73. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 1 (2007).

74. *Id.* at cmts. 2-3 (2007).

75. *See generally* Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 203-07 (2007).

76. Rule 1.6(b)(6) of the American Bar Association Model Rules of Professional Conduct will allow a district attorney to reveal confidential information of a former-client-turned-witness assuming the information constitutes exculpatory evidence and the court grants an order compelling disclosure. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2007)

77. *See.* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (establishing a presumptive duty of non-disclosure regarding all information relating to the representation), as opposed to Rule 1.6(b)(6) (carving an exception to confidentiality based on a court order). MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6).

harm to the witness and the interest of society in protecting confidentiality, the court must have the countervailing authority to exercise its inherent power and disqualify a district attorney in instances where the harm to the state is relatively small and the harm to the former-client-turned-witness is great. For example, disqualification based on inherent powers may be appropriate where the state can easily appoint another district attorney to prosecute the defendant who has not represented any of the key witnesses in the case against defendant.

Moreover, given the public interest in preserving confidentiality, the court may exercise its inherent power and disqualify the district attorney even if the former client waives his confidentiality interest. Such disqualification may be warranted in circumstances where the court believes that the former-client-turned-witness was facing a dilemma of having to choose between protecting his confidentiality interest and winning favor with the district attorney, or where the court finds that that the former-client may be colluding with the district attorney. Such collusion, for example, may be the result of the former relationship between the witness and the district attorney.

When a district attorney once represented a government witness, a court should be able to assess the totality of the circumstances and use its inherent power to disqualify the district attorney if disqualification is necessary the protect the interests of a former-client-turned-witness and the integrity of the trial. Otherwise, the important interest of the former client in protecting his confidentiality may be compromised, and with it, the integrity of the fact-finding process. To be sure, consistent with the "happy indeterminacy" approach and the framework set by *Link* and *Chambers* courts should use their inherent power to disqualify district attorneys sparingly. And yet disqualification statutes that usurp the inherent power of the courts and deprive courts of the authority to protect the interests of third parties, such as former-clients-turned-witnesses, are not only unconstitutional but also undesirable.

II. STATUTORY DISQUALIFICATION OF DISTRICT ATTORNEYS

A. Statutory Disqualification

Providing an overview of disqualification statutes is difficult because the majority of states do not have disqualification statutes,[78] some state statutes do not directly state the grounds for disqualification but rather grant the court the power to appoint a special prosecutor when, among other reasons, the district attorney is disqualified,[79] and among

78. Suggesting perhaps that some state legislatures defer to courts regarding whether to disqualify a district attorney.

79. For example, Nevada's statute states that: "[i]f the district attorney . . . for any reason is disqualified . . . the court may appoint some other person to perform the duties of the district attorney." NEV. REV. STAT. ANN. § 252.100.1 (West 2007); *see also* ALA. CODE § 12-17-186(a) (2007);

the states with statutes clearly stating bases for disqualification the grounds vary considerably. This section analyzes Colorado's legislation, and uses it as a basis for comparative analysis of some other states' responses to this issue.

C.R.S. subsection 20-1-107(2) reads in relevant part:

> A district attorney may only be disqualified in a particular case at the request of the district attorney or upon a showing that the district attorney has a personal or financial interest or finds [sic] *special circumstances that would render it unlikely that the defendant would receive a fair trial* . . . .[80]

Whether "special circumstances" include representation by a district attorney of former-clients-turned-witnesses for the government is a question of first impression for the Colorado Supreme Court.[81] The first two prongs of the statute, request by the district attorney and showing of a conflict of interest are irrelevant here. To date, the "special circumstances" prong of subsection 20-1-107(2) has mostly been invoked when a district attorney previously represented the defendant. Subsection 1 thus explores "special circumstances" when the district attorney represented the defendant, subsection 2 examines other instances in which "special circumstances" have been construed and subsection 3 studies disqualification statutes in other jurisdictions.

1. "Special Circumstances" When the District Attorney Represented the Defendant: The *Unfair Advantage* Standard

In *People v. Chavez*,[82] the Colorado Supreme Court construed, for the first time, the "special circumstances" prong of the statute when the district attorney previously represented the defendant.[83] The court held

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IOWA CODE ANN. § 331.754(2) (West 2007); MINN. STAT. ANN. § 388.12 (West 2007); N.Y. COUNTY LAW § 701(1) (McKinney 2007); OKLA. STAT. ANN. tit. 22, § 859 (West 2007) ("If the district attorney . . . is disqualified, the court must appoint some attorney-at-law to perform the duties of the district attorney on such trial.").

80. COLO. REV. STAT. ANN. § 20-1-107(2) (West 2007) (emphasis added). The statute's ambiguous language means either that a district attorney may be disqualified upon a showing that the district attorney has a personal interest or a showing that the *district attorney* finds special circumstances; or that a district attorney may be disqualified upon a showing that the district attorney has a personal interest or a finding by a *court* that there are special circumstances. As Justice Bender explains in People *ex rel.* N.R., 139 P.3d 649, 675 (Colo. 2006), the latter reading, vesting authority in the courts to find "special circumstances," is both more reasonable and compelling.

81. One amicus brief filed in *Lincoln* suggests that no case decided the issue before because "disqualification in this situation is such a leap of logic that no judge had previously granted such a motion." Brief for Colorado District Attorney's Office Council, *supra* note 66, at 5. Of course, in the alternative, this may simply be an issue of first impression.

82. 139 P.3d 649.

83. *Id.* at 653. The court noted that while it never construed subsection 20-1-107(2) before, it did explore the kinds of facts that warrant disqualification to ensure that defendant receives a fair trial in *Farina* and *Osborn*. *See infra* note 97 and accompanying text. The court explained that while the cases were decided under the appearance of impropriety standard replaced by the statute, their precedential value stems from the analysis of facts upon which the court may conclude that the accused will probably not receive a fair trial. *Chavez*, 139 P.3d at 653 n.5.

that "where the prosecuting attorney had an attorney-client relationship with the defendant in a case that was substantially related to the case in which the defendant is being prosecuted, 'circumstances exist that would render it unlikely that the defendant would receive a fair trial.'"[84] The court noted that the advantage that such an attorney-client relationship could give the district attorney on cross-examination of the defendant 'is obvious,'[85] and reasoned that both passage of time between the attorney-client relationship and the prosecution,[86] and factual distinctions between the two cases would be relevant in assessing "special circumstances."[87]

It is noteworthy that the court did not find that that any representation of the defendant warrants disqualification of the district attorney, but rather only representation that is the same or "substantially related to the case in which the defendant is being prosecuted" supports disqualification, subject to the passage of time consideration.[88] No doubt, any prior representation of the defendant by the district attorney will give the government an "obvious" advantage on cross-examination of the defendant. Yet the court reasoned that the advantage only results in unfairness to the defendant when the prior representation is the same or "substantially related" to the current prosecution, presumably because when the representation is "substantially related" the advantage to the government results not only from the district attorney's general familiarity with the defendant but also from knowledge of relevant confidential information related to the current prosecution.[89]

In *People v. Manzanares*,[90] the Colorado Supreme Court expanded its analysis of "special circumstances" in two ways.[91] First, with regard to the identity of individuals who could trigger disqualification, it held that "special circumstances" may exist not only when a district attorney previously represented the defendant, but also when other employees in the District Attorney's Office gained confidential information about the defendant's case.[92] Because the key issue is advantage to the government at the expense of the defendant, the court disqualified the District

84. *Chavez*, 139 P.3d at 653 (quoting COLO. REV. STAT. § 20-1-107(2) (2005)).

85. *Id.* (quoting Osborn v. Dist. Court, 14th Judicial Dist., 619 P.2d 41, 45 (Colo. 1980)).

86. *Id.* (citing *Osborn*, 619 P.2d at 48) (noting that the *Osborn* court found that the passage of thirteen years between representation of the defendant and prosecution supported the conclusion that the defendant had not met his burden of proving he would not receive a fair trial).

87. *Id.* at 653-54 (finding that the district attorney in question had an attorney-client relationship with the defendant and that the relationship was substantially related to the instant prosecution, the court disqualified the district attorney).

88. *Id.* at 653.

89. *Id.* at 654.

90. 139 P.3d 655 (Colo. 2006).

91. *Id.* at 658-59 (remanding because the court found that "[w]e are unable to determine, on the record before us, whether 'special circumstances' exist . . . [because] the record does not disclose whether [the district attorney's] prior representation of the defendant was 'substantially related' to the instant prosecution." (quoting *Chavez*, 139 P.3d at 653)).

92. *Id.* at 659. In *Manzanares*, a clerical employee who worked for the defense attorney who represented the defendant later joined the district attorney's office. *Id.*

Attorney's Office even when the tainted individual was not a former defense attorney-turned-district attorney but a clerical employee: the employee learned confidential information about the defendant while working in private practice that would have given the district attorney an advantage in cross-examining the defendant. Second, the court explained that an important factor in assessing "special circumstances" when a district attorney has represented the defendant is the "possibility that confidential information could be used to the advantage of the government."[93]

The court therefore found "special circumstances" rendering it "unlikely that the defendant would receive a fair trial" when the representation of the defendant by the district attorney could give the government an unfair advantage.[94] The court reasoned that the government benefits to the extent that the trial is rendered "unlikely fair" when the district attorney can take advantage of the former relationship to more effectively cross-examine the defendant, and explained that such an obvious unfair advantage takes place when the former representation and the current prosecution are "substantially related" because of the high probability that the district attorney would have knowledge of relevant confidential information.[95]

Earlier decisions by the court preceding the statute further clarify the appropriate scope of "special circumstance" and "fair trial."[96] In *People* ex rel. *Farina* the trial court disqualified the district attorney who thirteen years prior, while in private practice, represented the defendant in an unrelated matter.[97] The court reversed. It found that "where the two incidents arose from entirely unrelated transactions and are separated by nearly thirteen years, no reasonable appearance of impropriety exists."[98] Specifically, the court found that the factual settings of the two cases were significantly different.[99] In other words, the passage of time

93. *Id.* In a third case construing the statute, People *ex rel.* E.L.T., 139 P.3d 685, 686 (Colo. 2006), the defendants argued that the district attorneys represented them when they were in private practice and gained confidential attorney-client information about defendants as a result of this representation. The court remanded because it was unable to determine the legal basis for the trial court's disqualification of the district attorney and directed the lower court to its decision in *Chavez*. *Id.* at 687 (citing *Chavez*, 139 P.3d at 655).

94. *Manzanares*, 139 P.3d at 659.

95. *See id.*

96. As the court pointed out in *Chavez*, 139 P.3d at 653, earlier case law construing the amended disqualification statute is nonetheless relevant to the extent it considered what type of facts support the conclusion that disqualification is necessary to ensure that the defendant receives a fair trial. *See also* People *ex rel.* N.R., 139 P.3d 649, 677 (Colo. 2006).

97. Osborn v. Dist. Court, 14th Judicial Dist., 619 P.2d 41, 47 (Colo. 1980). *Osborne* consolidated two cases, *Osborne* and *Farina* which the court considered separately because of their different facts. *Id.* at 44. *Osborne* is discussed below, *infra* note 148-52 and accompanying text.

98. *Id.* at 47.

99. *Id.* ("[T]he [older] matter arose from a disturbance in a bar owned by [defendant's] mother while the pending prosecution is in connection with an alleged burglary. Although both incidents involved acts of violence, it can hardly be said that they are 'substantially related.' This is particularly so in light of the fact that they are separated by nearly thirteen years.").

and the unrelated nature of the former representation and current prosecution made it less likely that the government would benefit from the former representation and therefore there was no unfairness to the defendant.

2. "Special Circumstances" When the District Attorney Did Not Represent the Defendant: The *Balancing of Interests* Standard

In *People* ex rel. *N.R.*,[100] the Colorado Supreme Court was called upon for the first time to construe "special circumstances" under the statute in a case not involving a district attorney's former representation of the defendant. The court explored the defendant's contention that the district attorney's attempt to reap political gain from the prosecution constituted "special circumstances" which would render it unlikely he will receive a fair trial. The court found that "even if [the district attorney] owes his election to the Office of District Attorney in part to the efforts of the [victim's] family, this fact [is not] likely to cause him to 'over extend' in performing his prosecutorial function."[101]

The court's conclusion hinged on the facts of the case. The court explained that the defendant must establish facts from which the court could reasonably conclude that he would not receive a fair trial and found that a mere assertion of political indebtedness is not sufficient to establish special circumstances.[102] Rather, the defendant has to demonstrate "over extension" in order to meet the "special circumstances" burden.[103] In other words, the court did not rule out political indebtedness as a relevant consideration in assessing "special circumstances" but instead found that in this particular case the defendant did not prove that such political indebtedness in fact caused the district attorney to over extend himself.[104] Importantly, the dissent pointed out, however, that the trial court specifically found that "the public would view the prosecution as a 'political payoff,' and if the district attorney continued to prosecute it would 'undermine the credibility of the criminal process.'"[105]

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100. 139 P.3d at 671. A newly elected district attorney filed charges against a minor who was involved in a car accident and left the scene after his predecessor decided not to file charges. *Id.* at 673. Defendant argued that the district attorney's decision was motivated by political pressure by the victim's parents. *Id.* at 676. The court first explored what sort of "interest" may serve as the basis for disqualification. *Id.* at 676-77. It held that the district attorney must stand to receive some personal benefit and found that possible political capital the district attorney might gain in future elections as the result of prosecuting the defendant is insufficient to meet the standard. *Id.*

101. *Id.* at 678.

102. *Id.* at 677-78.

103. *Id.* at 678.

104. *See id.*

105. *Id.* at 680 n.4 (Bender, J., dissenting). The dissent did not explore political indebtedness as an instance of "special circumstances" but instead argued that "political payoff" that would "undermine the credibility of the criminal process" triggers the courts' inherent powers. *Id.* at 684-85. Justice Bender explicitly refused to limit the scope of its dissent to the construction of the "special circumstances" grounds of disqualification pursuant to the statute exactly because he believes that

Prior decisions of the court preceding the enactment of the statute once again shed additional light on the construction of "special circumstances" and an "unfair" trial. In *People v. C.V.*[106] the defendant moved to disqualify the district attorney because the district attorney regularly attended a church that was the scene of the alleged crime.[107] Exploring whether the defendant will be denied a fair trial, the court stated that it looks to "whether the facts support a conclusion that the 'public would perceive continued prosecution by the district attorney's office, under the particular circumstances here, as improper and unjust, so as to undermine the credibility of the criminal process in our courts.'"[108] Subsequently, assessing the "particular circumstances here" the court balanced the interests of the defendant against performance of the duties of the District Attorney's Office.[109] It considered as relevant factors the size of the community in question and the impact of disqualification on it.[110] The court also cautioned against too low a standard that would allow defendants the "unfettered option of disqualifying a prosecutor whenever a district attorney had knowledge of any fact surrounding the case,"[111] and against "the most cynical view" approach that would find "far too attenuated" facts supportive of disqualification.[112]

In *People v. District Court* ex rel. *Second Judicial District*,[113] the defendant argued that the district attorney who was also a mayoral candidate would reap political gain from prosecuting the defendant and would be placed in a position of over extending in an effort to convict and thus would unfairly try the defendant.[114] In evidence, defendant submitted a copy of a news article which was later reprinted as a paid advertisement by a committee to elect the district attorney.[115] The court found this evidence insufficient to justify disqualification.[116] While the court's language could be construed to refer only to the evidentiary showing the defendant must make, it could also suggest the court's con-

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courts have the inherent powers to disqualify district attorneys in addition to and irrespective of a disqualification statute. *Id.* at 680 n.4.

106. 64 P.3d 272 (Colo. 2003) (en banc).

107. *Id.* at 274 (reversing disqualification on the ground that the trial court had insufficient evidence to reach such a conclusion).

108. *Id.* at 276 (citations omitted).

109. The court found that disqualifying a district attorney who happened to attend a facility where a crime later took place would "greatly impair the independence of the district attorney and could serve to prejudice the constitutional duties he or she performs." *Id.*

110. "Especially in smaller communities, the defendant's argument could potentially disqualify the district attorney in practically every prosecution." *Id.*

111. *Id.* at 276-77.

112. *Id.* at 275, 277.

113. 538 P.2d 887 (Colo. 1975) (en banc).

114. *Id.* at 888.

115. *Id.* at 889.

116. *Id.* ("The language of the editorial indicates only a newspaper's belief that the district attorney is properly performing his responsibilities and duties as district attorney in the [] case. There are no other inferences which could be drawn from this language. Clearly, it would be beyond belief that anyone could state on the basis of this editorial that defendant [] would be subjected to an unfair trial because of this district attorney's past, current, or future participation in the case.").

cern with too quick a finding of "unfair trial" and "special circumstances" warranting disqualification.

Finally, in *Wheeler v. District Court* ex rel. *Adams County*,[117] defendant argued that disqualification was warranted because he testified against the district attorney in an unrelated case.[118] Assessing whether the district attorney's "personal antagonism, animosity, hostility or enmity" toward defendant would deny defendant a fair trial, the court was concerned with the performance of the duties of the District Attorney's Office.[119] It reasoned that the mere fact that a defendant has testified against or made derogatory remarks about a district attorney was insufficient to "convince a sane and reasonable mind" that the attacked district attorney would be biased or prejudiced.[120]

Twin standards emerge from the case law determining whether "special circumstances" exist. When the district attorney formerly represented the defendant, the "unfair advantage" standard applies and "special circumstances" exist when the former representation and the current prosecution are "substantially related" because the district attorney likely learned relevant confidential information and would be able to use it to the benefit of the government while cross-examining the defendant. Such an unfair advantage would undermine the credibility of the criminal process in our courts.

When the district attorney did not represent the defendant, the passage of confidential information from the defendant to the district attorney is obviously not a concern and the "balancing of interests" standard applies. The likely fairness of the trial is assessed by balancing the interests of the defendant against the performance of the duties of the District Attorney's Office. "Special circumstances" exist when the district attorney is likely to "over extend," when the district attorney has "personal antagonism, animosity, hostility or enmity" against the defendant, or when the defendant can establish facts, such as political indebtedness, that would render the trial unfair.[121]

3. Comparative Analysis

Before turning to the application of these standards to the first impression issue of a district attorney who represented former-clients-turned-witnesses for the government, we turn our attention to disqualification statutes and experience of other jurisdictions. For purposes of

117. 504 P.2d 1094 (Colo. 1973) (en banc).
118. *Id.* at 1095.
119. *Id.*
120. *Id.* at 1096.
121. In balancing the interests of the defendant against the performance of the duties of the district attorney's office relevant considerations include the size of the legal community and the impact of disqualification on the ability of the District Attorney's Office to perform its duties. *See* People v. C.V., 64 P.3d 272, 276 (Colo. 2003) (en banc).

comparative analysis, it is helpful to draw a distinction between the three grounds for disqualification in the Colorado statute. The first two—a request by the district attorney and a personal or financial conflict of interest—are narrowly and specifically defined, whereas the third ground—"special circumstances"—is, relative to the former two grounds, open-ended.[122] As we have seen, the latter covers at least disqualification of a district attorney who represented the defendant in the same or substantially related case and opens the door for disqualification even when the district attorney did not represent the defendant.

Most jurisdictions with a disqualification statute state only narrow and specific grounds for disqualification, akin to Colorado's first two grounds. Interestingly, some cover in a narrowly stated ground the situation Colorado covers in its open-ended "special circumstances" ground, that is, representation of the defendant by the district attorney.[123] Several jurisdictions do have open-ended standards of disqualification, however, their respective case law interpreting the standards is scant.[124]

California's statute is in substance similar to Colorado's. It states in relevant part that: "[a disqualification] motion may not be granted unless the evidence shows that a conflict of interest exists that would *render it*

122. Yet not open-ended enough to include the appearance of impropriety as a ground for disqualification. *See supra* notes 39-45.

123. For example, the Alabama statute allows for disqualification when the district attorney is "connected with the party against whom it is his duty to appear," ALA. CODE § 12-17-186(a) (2007); the Kentucky statute states, in relevant part, that a prosecuting attorney shall disqualify himself if he "[h]as served in private practice or government service, other than as a prosecuting attorney, as a lawyer or rendered a legal opinion in the matter in controversy." KY. REV. STAT. ANN. § 15.733(2)(e) (2007); *see also* IDAHO CODE ANN. § 31-2603(a) (2007) (allows for disqualification when the district attorney "acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged, and for which he is to be tried on a criminal charge."); LA. CODE CRIM. PROC. ANN. art. 680(3) (2007) ("A district attorney shall be recused when he . . . [h]as been employed or consulted in the case as attorney for the defendant before his election or appointment as district attorney.").

124. Iowa's statute permits the appointment of a special prosecutor if the district attorney is "disqualified because of a conflict of interest from performing duties." IOWA CODE § 331.754.2 (2006); *see* State v. Brandt, 253 N.W.2d 253, 262 (Iowa 1977) (the prosecutor disqualified herself and requested the appointment of a special prosecutor). Indiana's statute allows the court to disqualify a district attorney if it finds "by clear and convincing evidence that the appointment [of a special prosecutor] is necessary to avoid an actual conflict of interest." IND. CODE § 33-39-1-6(b)(2)(B) (2007). Georgia's statute similarly states: "When a solicitor-general's office is disqualified from interest or relationship to engage in the prosecution." GA. CODE ANN. § 15-18-65(a) (2007); *see also* 55 ILL. COMP. STAT. ANN. 5/3-9008 (2007) ("Whenever the State's attorney is . . . interested in any cause or proceeding . . . ."); MICH COMP. LAWS SERV. § 49.160(1) (2007) ("If the prosecuting attorney . . . [is] disqualified by reason of conflict of interest . . . ."); MO. ANN. STAT. § 56.110 (2007). Oregon's statute combines specific grounds for disqualification such as "if a district attorney . . . represented the accused in the matter to be investigated . . . or the crime charged" with an open-ended ground "or because of any other conflict cannot ethically serve as a district attorney in a particular case." OR. REV. STAT. ANN. § 8.710 (2007); *see* State v. Gauthier, 231 P. 141 (Or. 1924). Virginia's statute is open-ended, allowing for disqualification if the district attorney "is so situated with respect to such accused as to render it improper . . . for him to act." VA. CODE ANN. § 19.2-155 (2007); *see also* W. VA. CODE ANN. § 7-7-8 (2007) (applying the "improper" standard for disqualification). The Virginia Supreme Court applies the rule of *ejusdem generis* to the general statutory language of "reason of a temporary nature" and holds that the term must be restricted to meanings "analogous to 'sickness' or 'disability.'" *In re* Morrisey, 433 S.E.2d 918, 918 (Va. 1993).

unlikely that the defendant would receive a fair trial."[125] The standard for the interpretation of the statute was set in *People v. Conner*,[126] in which the California Supreme Court defined a conflict for purposes of construing the statute as existing "whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner."[127] The conflict is disabling under section 1424 when it is "'so grave as to render it unlikely that the defendant will receive fair treatment' during all portions of the criminal proceedings."[128]

In *People v. Eubanks*,[129] the California Supreme Court specified a two-part test for determining whether recusal of a district attorney is necessary based on a conflict of interest: (1) whether there is a conflict of interest, and (2) if so, whether the conflict is so grave or severe as to disqualify the district attorney from acting.[130] Under the second prong of this test, the potential for prejudice to the defendant must be real, not merely apparent, and must rise to the level of a likelihood of unfairness.[131]

With regard to the "unfair advantage" standard, consistent with Colorado law, the California Supreme Court disqualified a district attorney who represented a defendant in a "substantially related" case.[132] Regarding the "balancing of interests" standard, California case law is instructive because California courts have interpreted the California statute, and specifically its "fair trial" element, in circumstances where the district attorney did not represent the defendant.[133]

The first category of cases involves circumstances where the California Supreme Court was concerned with the independence of the district attorney's exercise of discretion. If a victim or another party funds or helps fund the prosecution's case, a conflict of interest is worthy of disqualification if the facts show that "the private financial contributions are of a nature and magnitude likely to put the prosecutor's discretionary decision-making within the influence or control of an interested party."[134]

125. CAL. PENAL CODE § 1424(a)(1) (2007) (emphasis added).

126. 666 P.2d 5 (Cal. 1983).

127. *Id.* at 9.

128. People v. Snow, 65 P.3d 749, 773-74 (Cal. 2003).

129. 927 P.2d 310 (Cal. 1996).

130. *Id.* at 318; *see Snow*, 65 P.3d at 773-74; *Conner*, 666 P.2d at 8-9; People v. Choi, 94 Cal. Rptr. 2d 922, 926 (Cal. Ct. App. 2000).

131. Hambarian v. Superior Court, 44 P.3d 102, 114 (Cal. 2002).

132. City of San Francisco v. Cobra Solutions, 135 P.3d 20 (Cal. 2006) (holding District attorney's possession of a criminal defendant's confidential attorney-client information regarding the charged offenses is a proper basis for disqualifying the district attorney from participating in the prosecution to ensure a fair trial).

133. *See* People v. Jiang, 33 Cal. Rptr. 3d 184, 208 (Cal. Ct. App. 2005).

134. *See Eubanks*, 927 P.2d at 322. If the prosecutor/district attorney's office requests payment from victim for costs that the office already incurred during the prosecution, disqualification may be possible. *Id.* at 323. In other words, if the prosecutor solicited financial assistance, the prosecutor's discretionary judgment may be skewed. *Id.* at 324 (George, C.J., concurring).

The size of the contribution is compared to the normal level of funds generally allotted to this or a similar prosecution.[135] In other words, the court must determine whether the contribution was substantial compared to the District Attorney's Office's normal budgetary allotment or resources.[136] The strength of the case against the defendant matters in assessing the importance of the financial factor.[137] In addition, the court must determine whether the financial provider had an interest in prosecuting the specific defendant, or an interest in benefiting the general public corresponding with the interest of the prosecution.[138] That is, two related factors are whether the financial provider is a private party[139] and whether the defendant's actions directly harmed the financial provider.[140] Moreover, even an institutional agreement between government agencies *may* create a conflict of interest that triggers disqualification because the arrangement would negatively affect the prosecutor's discretionary judgment.[141] Similarly, the court held that close family relationship between the defendant and longtime employees of a District Attorney's Office may qualify as grounds for disqualification because such ties are likely to influence the district attorney's discretion.[142]

A related category deals with publicly disclosing information relevant to the case and information that may taint the public's perceptions of defendant. For example, in *People v. Choi*,[143] the court was concerned that the district attorney's loss of a close friend had adversely affected his independent judgment in such a way that defendant's right to a fair trial

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135. *Id.* at 323.

136. *Id.* at 324 (George, C.J., concurring).

137. "Arguably, a factually weak case is more subject than a strong case to influence by extraneous financial considerations, since in the absence of financial assistance from the victim the prosecutor is more likely to abandon or plea bargain such a case." *Id.* at 323.

138. *Compare Eubanks*, 927 P.2d 310, where the interested party that provided financial assistance was a corporation from which defendant allegedly stole trade secrets, *with People v. Parmar*, where a government agency contracted with the district attorney's office to provide financial assistance in order to prosecute public nuisances generally. 104 Cal. Rptr. 2d 31 (Cal. Ct. App. 2001).

139. Hambarian v. Superior Court, 44 P.3d 102, 109 (Cal. 2002); *Parmar*, 104 Cal. Rptr. 2d at 42; *Eubanks*, 927 P.2d at 320.

140. *Parmar*, 104 Cal. Rptr. 2d at 42.

141. Marshall v. Jerrico, Inc., 446 U.S. 238, 250 (1980); *Parmar*, 104 Cal. Rptr. 2d at 42; *Eubanks*, 927 P.2d at 320 (emphasis added) ("For example, a scheme that provides monetary rewards to a prosecutorial office might carry the potential impermissibly to skew a prosecutor's exercise of the charging and plea bargaining functions.").

142. People v. Vasquez, 137 P.3d 199, 203 (Cal. 2006) (finding close family ties where defendant's mother worked as an administrator in the district attorney's office for about 13 years, and her husband, defendant's stepfather had been employed for around the same amount of time as a deputy district attorney). The fact that the prosecutor admitted fear of the appearance of favoritism towards defendant, and that fear influenced the decision to reject defendant's request for bench trial rather than jury trial showed the existence of a conflict of interest and its extreme gravity. *Id.* at 203-04. However, compare this to *People v. Petrisca*, 41 Cal. Rptr. 3d 182, 183 (Cal. Ct. App. 2006), where the defendant was charged with murder and other felonies for driving at excessive speeds on the wrong side of the road and colliding with two vehicles. The driver of one vehicle incurred fatal injuries and was also the mother of a deputy district attorney in the office. *Id.* The prosecutor was chosen for the specific reason that the deputy district attorney and the prosecutor did not have a social relationship—disqualification was not required. *Id.* at 185.

143. 94 Cal. Rptr. 2d 922 (Cal. Ct. App. 2000).

was endangered.[144] It found that the district attorney's disclosure of information related to the case demonstrated the adverse impact and disqualified the district attorney.[145] Finally, the court decided cases triggering disqualification based on the district attorney appearing as a witness. For example, when a prosecutor witnesses the defendant's illegal actions the conflict may be so grave as to require disqualification.[146]

Read together, California's extensive case law construing its disqualification statute expands Colorado's "balancing of interests" standard. It clarifies that not every conflict of interest gives rise to "special circumstances" warranting disqualification, rather, the prejudice against defendant must be severe enough to constitute unfairness.

B. Disqualification of a District Attorney Whose Former Client is a Witness for the Government: Striking a Balance at the Point of Unfair Advantage

First impression construction of the "special circumstances" prong when the district attorney represented former-clients-turned-witnesses for the government should build on and combine both the "unfair advantage" and the "balancing of interests" standards. Reliance on the "unfair advantage" standard is warranted because representation of witnesses for the government by the district attorney resembles representation of the defendant in two important ways.

First, the unfair advantage to the government stems from the district attorney's former representation of clients-turned-witnesses. "Special circumstances" simply do not require that the former representation be of the defendant. Indeed, in *Manzanares* the court recognized that people other than the district attorney and the defendant might cause disqualification.[147]

Second, the former representation gives the district attorney an "obvious" advantage over the defendant in terms of questioning the former-client-turned-witness. An instructive case is *Osborn v. District Court, Fourteenth Judicial District*.[148] *Osborne* involved a former district attorney who after participating in the prosecution of the defendant joined a law firm that handled defendant's appeal and re-trial.[149] The court upheld the disqualification of the former district attorney.[150] It found that the district attorney "took part in the interview of the victim, the arresting officers, and many other important prosecution witnesses. Most impor-

144. *Id.*
145. *Id.* at 927.
146. People v. Jenan, 44 Cal. Rptr. 3d 771, 776 (Cal. Ct. App. 2006).
147. People v. Manzanares, 139 P.3d 655, 658-59 (Colo. 2006); *supra* notes 90-92 and accompanying text.
148. 619 P.2d 41 (Colo. 1980).
149. *Id.* at 44-45.
150. *Id.* at 45.

tantly, [the district attorney] had an ongoing relationship with the victim, who was then a juvenile undergoing a number of problems which required extended supervision."[151] The court concluded, "[t]he advantage that such a relationship could give a defense lawyer on cross-examination of the victim is obvious."[152] That is, the court held that the former district attorney's substantial participation in the same case and, importantly, the nature of her relationship with the witness (the victim) warranted her disqualification.

Yet analysis of the "unfair advantage" standard indicates that not every advantage to the government renders the trial "likely unfair" from the defendant's point of view. When the district attorney represented the defendant the court determined that the former representation results in an unfair advantage if it was the same or substantially related to the current prosecution because the relationship raised a serious concern that the district attorney might take advantage of related confidential information the defendant revealed.

Representation of a former-client-turned-witness differs from representation of the defendant because a key concern in the latter case is the passing of confidential information from the defendant to the district attorney which can give the government an unfair advantage. The advantage to the government here stems not from its access to confidential defendant's information, but from the relationship of the district attorney with a witness. To be sure, if the representation of the former-client-turned-witness is in the same or "substantially related" matter, the district attorney may have learned relevant confidential information while representing the witness. Such information, however, will not yield the government an unfair advantage because the district attorney will have to reveal all such exculpatory information to the defendant.[153]

It is important to note that the primary concern with regard to the representation of witnesses is the extent of their relationship with the district attorney and therefore mere discovery of information the district attorney learned about the witness is not sufficient to ensure fairness to the defendant. First, the district attorney could have learned confidential information about the witness that the defendant will not be entitled to and that the witness may not be under a duty to reveal. Second, the dis-

151. *Id.*

152. *Id.*

153. While COLO. R. PROF'L COND. R. 1.6(a) (2007) extends confidentiality to all information related to the representation of clients, COLO. R. PROF'L COND. R. 1.9(a) (2007) prohibits an attorney from representing another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of a former client, COLO. R. PROF'L COND R. 1.9(c) prohibits an attorney from using or revealing confidential information of a former client, and COLO. R. PROF'L COND R. 1.11(d)(1) (2007) subjects a district attorney to these provisions, nonetheless, COLO. R. PROF'L COND R. 1.6(b)(6) states that an attorney may reveal confidential information if required by other law. As the court pointed out in *Lincoln*, other law requires the disclosure of exculpatory information to the defendant. People v. Lincoln, 161 P.3d 1274, 1279-80 (Colo. 2007).

trict attorney's relationship with the witness will give the district attorney an advantage in examining the witness. For example, the district attorney might use information that does not meet the exculpatory threshold but nonetheless might help in eliciting favorable testimony from the client-turned witness. Moreover, given the prior relationship the witness might be partial toward his lawyer-turned-district attorney.[154]

Osborne clarifies that the court's concern is the fairness of the trial, and that knowledge of confidential information is not the standard for disqualification but rather an example of "special circumstances," and of an unfair advantage warranting disqualification.[155] To be sure, the court disqualified the district attorney-turned-defense attorney not because she possessed confidential information about the witness. Rather, the court disqualified the attorney because her former relationship with the witness in the case gave her an unfair advantage over the state in cross-examining the witness.[156]

The issue therefore becomes how to quantify the advantage to the government in assessing when the advantage from the former representation of former-clients-turned-witnesses compromises the fairness of the trial. The "balancing of interests" standard is on point and the California Supreme Court's two-step analysis requiring a conflict and then assessing its severity is helpful. The mere representation of the former-client-turned-witness satisfies the conflict requirement and yet unfairness to the defendant is only likely when the representation meets the severity requirement.[157] Balancing the interests of the defendant against the interests of the state in the performance of the duties of the District Attorney's Office and striking the balance at the point of an unfair advantage to the government means that a district attorney should be disqualified if she formerly represented a witness in a "substantially related" matter because the representation would give the district attorney an advantage over the defendant in examining the witness. *Osborn* is directly on point. The court held that the former district attorney's substantial participation in the same case warranted her disqualification.[158]

Moreover, even if the representation of the witness is not "substantially related" to the prosecution of defendant, the district attorney should be disqualified if her relationship with the witness would give her an unfair advantage over the defendant. The fact-specific, case-by-case determination will depend on elements such as the importance of the testimony (i.e., whether the former client is a key witness), the passage of

154. The desire of a former-client-turned-witness to help his former lawyer-turned-district attorney need not amount to committing perjury. The advantage to the government stems from the efforts of the witness to cooperate with thee district attorney given their relationship.

155. *See* Osborn v. District Court, Fourteenth Judicial Dist., 619 P.2d 41 (Colo. 1980).

156. *Id.* at 47.

157. *See supra* notes 129-133 and accompanying text.

158. 619 P.2d at 45.

time, the nature of the relationship between the witness and the district attorney, whether the relationship has concluded and the size of the community.

This proposed standard—combining the insights of both "unfair advantage" and the "balancing of interests"—leads to the question of how to assess factually the nature of the relationship between the district attorney and the former-client-turned-witness. Based on *Brady v. Maryland*,[159] in which the court held that a declaration by the district attorney that all exculpatory information has been disclosed would suffice, and the defendant could only challenge it with a good faith basis, a declaration by the district attorney outlining the nature of the relationship with the former-client-turned-witness should suffice to allow the court to assess the fairness to the defendant.[160]

In conclusion, representation of a former-client-turned-witness may constitute "special circumstances" that would render it unlikely that the defendant would receive a fair trial. Whether the advantage such representation gives the government over the defendant warrants disqualification depends on the facts of the representation. Balancing the interests of protecting the defendant's rights and ensuring the fairness of the trial against the state's interests of protecting the performance of the duties of the District Attorney's Office the court may rely on a declaration by the district attorney attesting to relevant facts regarding the relationship. For example, "special circumstances" do not exist when the district attorney briefly represented a witness ten years ago on an unrelated matter, had no significant contact with the former client since, and where the community is small, rendering it likely that a local defense-attorney-turned-district attorney will have contacts with people in the community. On the other hand, "special circumstances" do exist when the witness is likely to play a critical role in the prosecution, the district attorney had a longstanding relationship with the former-client-turned-witness, the relationship ended shortly before the current prosecution, or there are ongoing contacts between the former client and district attorney, for example, due to unpaid fees.

C. "Special Circumstances" and Imputed Disqualification

Next, a court would need to consider whether disqualification of a district attorney warrants disqualification of the entire District Attorney's

159. 373 U.S. 83 (1963).

160. *Lincoln*, 161 P.3d at 1281 ("A trial court can ask for and accept a prosecuting attorney's assurance that he or she has diligently reviewed the facts and circumstances of the prior representation and there is no exculpatory information required to be revealed by the constitution, statutes, and case law. This is so because, like all attorneys, the prosecuting attorney as an officer of the court must not lie or misrepresent facts to the court . . . . In addition, as a duty of office, a prosecutor, who wishes to continue prosecuting the case, must disclose to the court that he or she has exculpatory information and reveal that information if ordered to do so by the court.") (citations omitted).

Office. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 342 sets the stage for relaxed imputed disqualification of government attorneys.[161] The Committee held that disqualification of a former government attorney should not usually lead to the disqualification of the governmental agency in question.[162] It reasoned that the nature of the relationships between governmental attorneys, specifically the lack of a common shared interest in financial success contrasted with private lawyers practicing in a firm, allows for a more lax disqualification rule.[163] It concluded that a governmental agency need not be disqualified if the tainted attorney is appropriately screened.[164] The Opinion was adopted in *United States v. Caggiano*,[165] in which the Sixth Circuit Court of Appeals held that "when the individual attorney is separated from any participation on matters affecting his former client, 'vicarious disqualification of a government department is not necessary or wise.'"[166]

In *People v. Choi* the California Court of Appeals held that the "fair trial" analysis under section 1424 is applicable to the issue of imputed disqualification. That is, it found that in deciding whether to acknowledge a screen or disqualify an entire District Attorney Office, the court must assess the impact on the likelihood of the defendant receiving a fair trial.[167]

Colorado courts follow both Opinion 342 and *Caggiano* with regard to generally allowing effective screens within governmental agencies in lieu of disqualification of the entire department, and *Choi* in terms of deciding whether to impute a conflict to the entire District Attorney's Office or allow a screen based on an analysis of "special circumstances" and "fair trial." In *Chavez* the Colorado Supreme Court held that a properly drafted screening policy is relevant to the court's assessment of whether "special circumstances" require the disqualification of the entire office.[168] It found that "if the screening policy is adequate, then no disqualification [of the entire office] is necessary."[169] If the screening policy is inadequate, no immediate disqualification follows, rather, the court then must "determine whether confidential information from a prior rep-

161. 62 A.B.A. J. 517 (1976). The committee found that compelling policy considerations justify drawing a distinction between private and governmental lawyers for purposes of disqualification and held that a special, more lax government-friendly disqualification rule should apply to the latter attorneys. *Id.* at 518-20.

162. *Id.* at 521.

163. *Id.*

164. *Id.*

165. 660 F.2d 184 (6th Cir. 1981).

166. *Id.* at 191 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975)). The court sustained the disqualification of the individual defense attorney-turned district attorney and reversed the disqualification of the entire district attorney's office.

167. 94 Cal. Rptr. 2d 922, 926-28 (Cal. Ct. App. 2000). The court affirmed the trial court's disqualification of the entire office.

168. 139 P.3d 649, 654 (Colo. 2006).

169. *Id.*

resentation nevertheless *has been* and can continue to be adequately screened from others *actually* prosecuting the case."[170] In other words a conflict of interest and inadequate screening are not sufficient to warrant disqualification of the entire office. Instead, the key issue is whether confidential information can be screened not from all attorneys in the office but only from those actually prosecuting the defendant. In *Manzanares*, the court reiterated that a "properly drafted screening policy is indeed relevant to the determination of whether disqualification is necessary to ensure the defendant receives a fair trial,"[171] and remanded to the trial court to determine whether in fact confidential information has been and can continue to be protected.[172]

While a conflict of interest and an inadequate screening policy do not automatically lead to disqualification of the entire District Attorney's Office, a defective policy would place on the District Attorney's Office a higher burden of proving that no confidential information and other information benefiting the government regarding the former-client-turned-witness had been shared by the conflicted district attorney, and mere assurances by members of the Office would not be enough.

Specifically, while a declaration made by a district attorney assuring the court that all exculpatory information relating to a former-client-turned-witness has been revealed to the defendant or that no such exculpatory information required to be revealed exists would usually suffice without more to avoid disqualification,[173] the Colorado Supreme Court held in *Chavez* and *Manzanares* that such declaration would not be sufficient to prevent disqualification of the entire District Attorney's Office if a conflict exists and the screening policy is inadequate. Under such circumstances, the court required "something more" than the testimony or assertions of members of the District Attorney's Office.

> We note that the testimony of members of the District Attorney's Office alone would not mitigate any "special circumstances" present in this case.... [E]vidence of sharing of confidential information within the District Attorney's Office, "being under the control of the prosecution, would be well-nigh impossible for a defendant to bring forth."[174]

Similarly, evidence of sharing of confidential information and other information benefiting the government regarding the former-client-turned-witness by the conflicted district attorney would be "well-nigh

170. *Id.* at 654-55 (emphasis added).
171. *Id.* at 659.
172. *Id.*
173. *See supra* notes 163-64.
174. People v. Manzanares, 139 P.3d 655, 659 (Colo. 2006) (citations omitted).

impossible" for a defendant or the former-client-turned-witness to bring forth.[175]

Disqualification of a district attorney due to representation of a former-client-turned-witness for the government should not normally lead to the disqualification of the entire District Attorney's Office. Unlike representation of the defendant, the main concern regarding a former-client-turned-witness is not the passing of relevant confidential information but rather the advantage the government would yield from the former relationship. That advantage is the result of the relationship between the former defense attorney-turned-district attorney and the former-client-turned-witness. Thus effective screening of the district attorney in question would normally address the underlying concern by eliminating the advantage to the government while affirming the policy analysis of Opinion 342 and *Caggiano*.

III. RECENT COLORADO EXPERIENCE

In two separate cases, the Mesa County District Attorney's Office charged the defendant with criminal attempt to commit first degree murder, first degree assault and vehicular eluding.[176] Two prosecutors assigned to these cases, Richard Tuttle and Tammy Eret, previously acted as principal shareholders in a private law firm, Tuttle, Eret and Rubenstein, P.C. ("TER").[177]

In the pending cases against defendant, the prosecution endorsed over two hundred witnesses.[178] After learning that three of the endorsed

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175. Indeed, the trial court in *Lincoln* found that:

> Further, even if they declare that all exculpatory has been disclosed, as they have done, the guidelines enunciated in *Chavez* and *Manzanares* would necessitate something more than the testimony or assertions of the members of the District Attorney's Office in order to mitigate the "special circumstances" evidenced... The required "something more" has not been provided here. There is no written conflict screening policy, the oral screening policy is nebulous and therefore inadequate, and no attempt at a "Chinese wall" to screen those with confidential information has been made.

Supplemental Clarifying Order, People v. Lincoln, Nos. 05 CR 2027, 05 CR 2093, at *6 (D. Colo. Mar. 14, 2007) (on file with author).

176. People v. Lincoln, 161 P.3d 1274 (Colo. 2007). The first incident occurred on November 23, 2005, when defendant allegedly attempted to murder a fellow meth user. *Id.* at 1276. Several days later, on December 1, 2005, defendant allegedly fired shots at two Mesa County Sheriff's deputies as they were attempting to pull over his car after a week-long manhunt. *Id.* at 1276-77. Defendant, 25, is in prison for aggravated robbery. *See* Nancy Lofholm, *Family Finds Solace in Offering Hope, Warmth to Wayward Son*, DENVER POST, Nov. 9, 2006, at B-01, *available at* http://www.denverpost.com/search/ci_4627495. His conviction and the pending charges all stem from an alleged methamphetamine-fueled rampage in 2005. *Id.*

177. *Lincoln*, 161 P.3d at 1277 ("Tuttle and Eret served as district attorneys in Mesa County until 2002 when they left to open TER. The firm closed in December 2004 and Tuttle and Eret returned the District Attorney's Office. Dan Rubenstein also acted as a principal shareholder in TER and returned to the Mesa County District Attorney's Office at the same time as Tuttle and Eret. Rubenstein was not assigned to prosecute defendant's pending cases, but did act as a Chief Deputy District Attorney in Mesa County. The record is unclear about whether Rubenstein has any role connected with the prosecution of Lincoln's cases.").

178. *Id.* at 1277.

witnesses were previously represented by TER in unrelated matters,[179] defendant filed discovery motions seeking, inter alia, potentially exculpatory information concerning those former clients which could be used in cross-examination to question the credibility of the clients-turned witnesses.[180] Tuttle, Eret and the District Attorney's Office objected to these discovery motions, and in a related court hearing Mr. Tuttle represented that he did not know of any potentially exculpatory information that needed to be disclosed.[181] Defendant then moved to disqualify Tuttle, Eret and the District Attorney's Office pursuant to the Colorado disqualification statute and in the alternative pursuant to the court's inherent power on the basis that the involved prosecutors were unwilling or unable to provide potentially exculpatory information about their former clients, and because there was no way to ascertain whether Tuttle's claim of no potentially exculpatory evidence was accurate.[182]

The trial court did not generally decide when representation of former-clients-turned-witnesses will constitute "special circumstances" and lead to disqualification of a district attorney, but appropriately focused its attention on the specific claims raised by defendant, namely the inability of the prosecutors to reply to the discovery motions filed by defendant and the inability of the court to ascertain whether the prosecutors' claims of possessing no potentially exculpatory evidence were accurate.[183]

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179. *Id.* ("Sheriff's Deputy Michael Miller, a named victim in the second case, was represented by Eret in a contested domestic relations case, which concluded in 2004. A second witness, Corey Winkel, was represented by Eret in a 2002 felony marijuana distribution prosecution. TER was not fully paid for its legal services and turned the debt over to a collection agency in 2003. According to the record, the debt is still outstanding. In addition, [in 2006 Winkel was prosecuted by Tuttle, after Tuttle returned to the District Attorney's Office for a felony accessory charge related to the first pending case against defendant.] [A] third witness, Robert Thorpe, and several members of his family were represented by TER on a variety of business and personal matters between 2002 and 2004. Thorpe's daughter was prosecuted by the Mesa County District Attorney's Office on an unrelated charge in 2005 after Tuttle and Eret returned to that Office. Eret was involved in the review, charging and oversight of the prosecution of Thorpe's daughter, but she did not personally prosecute the case."). Thorpe and his family objected to the District Attorney's Office prosecution of the case filing their own request for a special prosecutor, which motion was ultimately denied. People *ex rel.* E.L.T., 139 P.3d 685, 685-88 (Colo. 2006).

180. *Id.*

181. *Id.*

182. *Id.* at *4; *see also* Mike Wiggins, *Lincoln to Seek Special Prosecutor*, GRAND JUNCTION DAILY SENTINEL, Jan. 30, 2007, at B-1. The defendant moved to disqualify the district attorneys and the District Attorney's Office based on representation of witnesses in the case only after the government moved to disqualify a defense attorney on the same ground - that he previously represented witnesses in the case against defendant. *See* Mike Saccone, *Motion May Delay Trial in Murder Attempt Case*, GRAND JUNCTION DAILY SENTINEL, Dec. 31, 2006, at B-8. Subsequently, Lincoln dismissed the defense attorney in question, rendering the People's disqualification motion moot. *See* Mike Saccone, *Suspect Dismisses Attorney*, GRAND JUNCTION DAILY SENTINEL, Jan. 6, 2007, at B-1.

183. Clarifying Order, *supra* note 175. The issue of first impression was not presented to the trial court as such. Rather than explicitly asserting that the Colorado disqualification statute authorized disqualification of district attorneys who represented former-clients-turned-witnesses and, in the alternative, that courts should exercise their inherent power to disqualify district attorney's in these circumstances, the defendant in *Lincoln* narrowly argued that the district attorneys' failure or inabil-

The trial court mistakenly held that district attorneys owe their former clients-turned-witnesses a duty of confidentiality that bars them from revealing any information about their former clients, let alone potentially exculpatory information,[184] that the confidentiality duty conflicts with the district attorneys' duty to reveal exculpatory information and concluded that the conflict results in an "irresolvable dilemma."[185] Moreover, the trial court held that the confidentiality duty owed to clients-turned-witnesses precludes the district attorneys from even divulging that they know of no exculpatory information related to prosecution and consequently that there is no way to assess whether such potentially exculpatory evidence exists.[186] The trial court concluded that the district attorneys' inability to reveal exculpatory evidence and the inability to assess its existence constitute "special circumstances" warranting disqualification under the statute.[187]

Next, the trial court asserted its inherent authority to protect the integrity of the court's fact-finding process and it disqualified the district attorneys, holding:

> The court cannot countenance the withholding of potentially material and exculpatory evidence, nor can it allow the public to have the impressions that legal ethics [rules] are enforced only when it is convenient to do so, that legal ethics [rules] do not apply to prosecutors, or that prosecutors can withhold or use confidential information to their advantage.[188]

The appearance of impropriety finding was based on two related legs: the impression of non-disclosure of exculpatory information and the impression that the rules of ethics such as confidentiality do not apply to prosecutors.

Finally, finding that "[t]here is no written conflict screening policy, the oral screening policy is nebulous and therefore inadequate, and no attempt at a 'Chinese wall' to screen those with confidential information has been made," the trial court imputed an "irresolvable dilemma" and disqualified the entire District Attorney's Office.[189]

The trial court's opinion established a very broad standard for disqualification of district attorneys who represented witnesses for the gov-

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ity to respond to discovery requests warranted disqualification. The trial court thus appropriately decided the narrow issue before it.

184. *Id.* at *5. To be sure, district attorney's do owe their former clients a duty of confidentiality, but whether the duty bars revealing information, or in other words, whether an exception applies, requires an analysis of COLO. RULES OF PROF'L CONDUCT 1.6(b) (2007).

185. *Id.* at *5-6.

186. *Id.*

187. *Id.* ("Neither the People's non-disclosure nor their use of any such confidential information must create an advantage to the government or disadvantage to the criminal defendant.")

188. *Id.* at *6.

189. *Id.*

ernment. What the trial court called an "irresolvable conflict" was in fact an irrebuttable presumption: that confidentiality duties to their former clients-turned-witnesses precluded district attorneys from disclosing possibly exculpatory information to the defendant, and therefore the defendant would be at a disadvantage and the district attorneys must be disqualified. As a result, every district attorney who represented a witness for the government faced an irresolvable and irrefutable conflict and would be disqualified.[190] The opinion caused a stir. Among others, the Attorney General filed an amicus brief in which he characterized the broad holding of the court as intruding "unnecessarily on the authority the people of Colorado have vested in local district attorneys through statute and the Constitution."[191]

The People filed an interlocutory appeal with the Colorado Supreme Court.[192] The court reversed and remanded.[193] It correctly held that a district attorney's disclosure requirement of exculpatory evidence pursuant to both federal constitutional law and Colorado state law trumps confidentiality duties owed by the district attorney to her former clients-turned-witnesses.[194] The conflict faced by the district attorney, concluded the court, "may be a dilemma, but it is not irresolvable."[195]

The court's decision was surprisingly narrow. Suggesting that the only issue of contention in *Lincoln* was whether non-disclosure of exculpatory information gave rise to "special circumstances" under the Colorado statute, the court (correctly) held that as a matter of law exculpatory information must be disclosed, and thus, arguably disposing of the "only" issue before it, reversed and remanded the case with directions to the trial court not to disqualify the district attorneys. The court, however, ignored the important question of law raised in *Lincoln*: does the law allow for disqualification of a district attorney who represented a witness

190. This broad standard had the peculiar result of automatically disqualifying district attorneys who represented clients-turned-witness, while not automatically disqualifying district attorneys who represented the defendant.

191. Brief for Colorado District Attorney's Council, *supra* note 66, at 6; *see also* Mike Saccone, *Attorney General to Support DA's Appeal*, GRAND JUNCTION DAILY SENTINEL, Mar. 17, 2007, at A-1.

192. Pursuant to COLO. REV. STAT. ANN. § 16-12-102(2) (West 2007) and COLO. REV. STAT. ANN. § 20-1-107(3) (West 2007).

193. People v. Lincoln, 161 P.3d 1274, 1282 (Colo. 2007).

194. *Id.* at 1279-81. The court concluded:

> The accused's due process right to a fair trial and the constitution, statutory, and ethical rules require a prosecuting attorney, if she or he wishes to remain on the case, to disclose exculpatory information even if it was obtained from a prior representation. In this situation, a prosecuting attorney has several options. She or he may obtain consent from the prior client waiving attorney-client confidentiality and authorizing disclosure of the exculpatory information. If consent is not obtained, she or he may (1) disqualify from prosecuting the accused and be screened from the office's prosecution of the case or (2) proceed with the prosecution, disclose to the court that she or he has exculpatory information, and reveal the information to the defense upon order of the Court.

Id. at 1281.

195. *Id.* at 1281.

for the government? Instead, the court merely cited its own case law construing "special circumstances" under the Colorado statute, which only deals with the disqualification of a district attorney who represented the defendant and fails to explore representation of clients-turned-witnesses. To be sure, ignoring the broader question of law was plausible based on a narrow reading of the trial court's order as disqualifying the district attorneys pursuant to the statute solely on the ground of non-disclosure of exculpatory information. Nonetheless, the court passed on an opportunity to decide a first impression question of law and failed to explore the circumstances under which the Colorado statute allows for disqualification of a district attorney who represented a witness for the government.

Worse, the Colorado Supreme Court ignored the issue of whether pursuant to its inherent powers a court may disqualify a district attorney who represented a witness for the government. The court's omission was peculiar: the defendant clearly raised the issue and sought disqualification based on the court's inherent powers in addition to invoking the disqualification statute, the trial court explicitly invoked its inherent powers in disqualifying the district attorney, and even the Attorney General explored the issue in detail in its amicus brief. Why the court ignored an issue clearly before it is unclear. Arguably, the court decided to avoid the issue because in asserting exclusive authority over district attorneys the Colorado statute is unconstitutional and deciding the issue would have required the court to strike this element of the statute down and pick a fight with the Colorado legislature. Moreover, deciding the issue would have required the court to explore the traitorous grounds of courts' inherent powers, a subject matter courts inside and outside of Colorado have been systematically avoiding.

The court's refusal to construe the Colorado disqualification statute and the inherent powers doctrine in the context of former representation of former-clients-turned-witnesses not only obscured this important legal question,[196] but also deprived the defendant of his "day in court" with regard to exploring the disqualification of involved district attorneys pursuant to the Colorado statute. Finally, the court left former-clients-turned-witnesses exposed to the possibility of being forced to testify and forced to waive confidentiality, without providing the trial court with the opportunity to consider all the relevant circumstances and act consistent with the interests of justice and preserving the integrity of the fact-finding in the case. Deciding *Lincoln* consistent with the standards established above would have allowed the court to remand the case to the trial court to determine whether the representation of former-clients

196. For example, the court's narrow opinion in *Lincoln* might erroneously be construed to mean that when a district attorney discloses exculpatory evidence no "special circumstances" exist. As demonstrated, however, mere disclosure of exculpatory evidence does not automatically and conclusively put to rest concerns regarding unfairness to the defendant.

Miller, Winkel and Thorpe constituted "special circumstances" warranting the disqualification of the district attorneys involved in the case; and, as importantly, to determine whether protecting the confidentiality interests of Miller, Winkel and Thorpe justified disqualification pursuant to the court's inherent powers.

CONCLUSION

Courts' exercise of inherent powers and disqualification statutes are two arenas in which the executive, legislative and judicial branches battle over the regulation and control of the District Attorney's Office. A state of "happy indeterminacy" with regard to the exercise of inherent powers, and judicial deference to the other two branches with regard to the construction of disqualification statutes may—from the perspective of the state and the courts—appropriately resolve allocating power and authority among the competing branches of government. However, in the context of disqualification of district attorneys whose former clients become government witnesses, this state of affairs harms defendants who are unable to disqualify district attorneys notwithstanding the possible existence of "special circumstances" that may render the trial unfair, and it harms former clients who become government witnesses and are unable to prevent disclosure of their confidential information.

In the context of this battle, the article advances the law of disqualification between the courts and the state. First, it explores the circumstances under which courts, in order to protect the confidentiality interests of former-clients-turned-witnesses, should exercise their inherent power to disqualify a district attorney whose former client has become a witness for the government even when the disqualification statute will not allow disqualification. Second, it proposes an interpretation of "special circumstances" which appropriately strikes a balance between protecting defendants' right to a fair trial against the state's legitimate interests of effectively pursuing law and order through the Office of the District Attorney and explores the circumstances under which this standard should result in the disqualification of the district attorney.